

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUAN MANUEL VALDEZ,

No. C-00-04733 MMC

Petitioner,

**ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

ROY A. CASTRO, Warden,

Respondent

/

Before the Court is Juan Manuel Valdez's ("Valdez") petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, on remand from the Ninth Circuit Court of Appeals. Pursuant to this Court's order requesting supplemental briefing, Valdez filed a supplemental memorandum, respondent Roy A. Castro ("Castro") filed a responsive supplemental memorandum, and Valdez filed a reply. Having considered all of the papers filed by the parties, and the record on appeal, the Court rules as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Valdez challenges his conviction of murder in the second degree, attempted murder, and shooting at an occupied building. In an unpublished decision filed January 29, 1999, the California Court of Appeal set forth the factual background as follows:

On April 9, 1993, beginning at around 10:30 p.m., nineteen-year-old Valdez drank eight to ten beers. He drank these beers over a period of a couple of hours. At approximately 1:00 a.m., he and three of his friends noticed that a party was underway at a warehouse in Watsonville. Valdez and his friends Gabriel Gonzalez and Jose Luis Mendoza had an altercation

1 with the bouncer who was monitoring entry to the party. Mendoza and
 2 Gonzalez were involved in a physical confrontation with the bouncer, in which
 3 Gonzalez sustained an injury to his head that bled profusely. The bouncer
 4 and other persons at the party told Valdez and his friends to leave. Valdez
 5 said in a "very angry and loud" manner: "Look what you did to my brother,
 6 motherfucker. We're going to get you. We're going to kill you." Valdez
 7 looked "mean," and he was challenging people to fight. He spoke "viciously"
 8 and clearly "wanted some revenge." Valdez seemed to believe that one of
 9 the partygoers had used a flashlight to hit Gonzalez. Valdez challenged this
 10 partygoer to fight. The partygoer refused to fight Valdez. Valdez threatened
 11 "I'm going to fucking kill you. I know who you are. I'm going to get a gun and
 12 come back here and fucking kill you." He also threatened "I'll be back with
 13 the gun to kill you motherfuckers." Gonzalez and Mendoza said "Yeah, we'll
 14 be back with a gun. We're going to kill you." All three men declared that
 15 "We're brown and proud" and threatened that they would be back to kill "all of
 [you] white motherfuckers." The three men then got into a car and left.

1 Valdez and his friends proceeded to a hospital. On the way to the
 2 hospital, Gonzalez asked Valdez "[w]here were you when we were getting our
 3 ass kicked." Valdez was already mad, and this statement made Valdez even
 4 more mad. Valdez insisted that he wanted to return to the warehouse and
 5 fight the "bouncer." Valdez and Mendoza left Gonzalez and their other friend
 6 at the hospital. Valdez directed Mendoza to drive them to a house where
 7 Edgar Paul Valencia, one of Valdez's best friends, was staying. Valdez was
 8 still intoxicated and mad. Valdez awakened Valencia and told him what had
 9 happened and that he wanted to go back to the party and fight with "some
 10 people." Valdez told Valencia that they would need protection because "the
 11 people at the party were very big." Either Mendoza or Valdez suggested that
 12 they obtain "sticks" for their protection, so they drove to another location and
 13 obtained "sticks." Then they returned to the warehouse.

14 The bouncer was no longer at the party, and all of the doors to the
 15 warehouse had been locked. Some potential partygoers arrived after the
 16 doors were locked and banged on the warehouse's metal door for a few
 17 minutes to try to gain admittance. They did not kick the door too hard
 18 because the door seemed so thin that they were afraid of bending it. No one
 19 answered. Valdez arrived at the warehouse with a tire iron in his hand.
 20 Valencia had a wooden stick in his hand, and Mendoza had some type of
 21 metal object in his hand. Valdez was visibly mad. He and Mendoza went up
 22 to the large 16 feet by 10 feet metal rollup warehouse door and began
 23 banging on it with their metal weapons, kicking it, throwing their bodies
 24 against it and demanding to be let in. The banging was strong enough to
 25 cause the door to move and shake. Valdez said "Open the fucking door. Let
 26 us the fuck in. You'd better let us in. We're going to fucking kill you all.
 27 Come on out, you chickenshits." Valdez challenged the occupants of the
 28 building to fight and said "We're going to kill you white fuckers" and "We're
 going to smash all your fucking cars." Valdez was very angry, violent and
 "obviously intoxicated." He struck the door several more times, and he said
 "[w]e're going to come back and kill you all." Valdez continued to beat on the
 door with the tire iron. The door rattled a lot, and the music inside went off.
 Someone inside said "Go home." This angered Valdez even more, and he
 banged on the door some more and repeated his threats. In all, the banging
 on the door lasted for four minutes. Valdez also went over to a BMW parked
 in front of the warehouse and punctured its tires. Valdez struck another
 vehicle with his tire iron. Mendoza and Valencia urged Valdez to leave.
 Gonzalez's brother, who was watching these events suggested that Mendoza
 "ram your fucking car" into the warehouse door. Mendoza declined to do so,

1 and the three men left.

2 After leaving the warehouse, Valdez was still mad and wanted to return
 3 to the warehouse. Valdez and Mendoza mentioned Valencia's rifle, and
 4 Valencia decided to get his rifle "for protection." Mendoza drove them to the
 5 house where the rifle was stored. Valencia and Valdez went into the house.
 6 Valencia took his loaded .22 caliber semi-automatic rifle from his bedroom
 7 and they returned to the car. Valencia placed the rifle in the trunk of the car.
 8 When they arrived back at the warehouse, Valencia removed his rifle from the
 9 trunk and placed it in the backseat of the car.

10 Two of the partygoers left the warehouse to check on the safety of their
 11 vehicles. They found their vehicles unscathed. One of them was holding a
 12 flashlight, and the other was holding a three-foot long piece of metal pipe in
 13 his left hand. The two men noticed that another vehicle had had its tires
 14 punctured. While the one holding the flashlight was kneeling beside this
 15 vehicle examining the punctured tires, the other man saw Valencia, Valdez
 16 and Mendoza returning. It was about 2:30 a.m. Valdez and Mendoza were
 17 wielding sticks or pipes. They approached the two partygoers and seemed to
 18 be trying to provoke a fight. They said to the two partygoers "you hurt my
 19 friend" and asked the two men to "come out in the street and fight with them."¹
 20 The two partygoers started to back away.

21 Valdez made a motion with his hand toward Valencia. It appeared that
 22 Valdez was pointing in the direction from which the three men had come.
 23 Valencia returned to the car and retrieved his rifle. He was gone for about 30
 24 seconds and returned holding the rifle down by his side. Valdez was hitting
 25 his stick-like weapon against his hand. Mendoza remained near the road,
 26 about a car length behind Valdez. One of the partygoers told the three men
 27 that the bouncer had gone home, and he asked them to leave. Valencia
 28 approached the other partygoer and pointed the rifle at his chest. Valencia
 29 said nothing. Two or three times, he lowered the rifle and then raised it again.
 30 After doing this, he pointed the rifle at this partygoer steadily. This partygoer
 31 raised his hands "in a passive surrendering motion." Valdez poked his stick
 32 at the same man about a foot away from the man's face. This man backed
 33 away from Valdez, and, with the other partygoer, ran toward the back of the
 34 warehouse. Their entire confrontation with Valdez, Mendoza and Valencia
 35 had taken about a minute.

36 After the two partygoers had run about 10 to 15 feet, they heard about
 37 10 shots being fired. Valencia fired his rifle at the large metal rollup door at
 38 least 11 times from a distance of between 15 and 30 feet. At least six shots
 39 penetrated the rollup door at heights between 21 inches and 68 inches. This
 40 rollup door was 24 thousandths of an inch thick. Two bullets struck the front
 41 wall of the building at about five and a half feet and six and a half feet off the
 42 ground. One bullet struck the back wall of the building. One person who was
 43 dancing inside the warehouse about ten feet from the door was struck by a
 44 bullet in the head and killed. Five others were struck by bullets and injured.

45 Valencia, Mendoza and Valdez ran to the car, and Mendoza drove
 46 away from town. Valdez took over the driving for a short distance, and then
 47 Valencia drove. At Valencia's direction, Valdez hid the rifle. Valdez's blood
 48 was drawn 18 hours after the shooting and found to contain no evidence of
 49 alcohol.

50 . . .

51 ¹ One of the partygoers was more than six feet tall, like the bouncer, and was
 52 holding a flashlight.

Valencia testified at trial that he got his rifle before they returned to the warehouse because he thought he could use it to prevent Valdez getting beat up. He retrieved his rifle from the car because he felt threatened by the two partygoers. He denied having had any intent to hurt anyone. He testified that he thought the door "was a hard door" and the bullets would "get stuck in the door" or bounce off.

Valdez presented evidence of his good character for non-violence, honesty, truthfulness and trustworthiness. Valdez also testified at trial. He admitted that he had become very mad because of the injury to Gonzalez and had wanted to fight the bouncer, but he denied making any verbal threats. Valdez claimed that he obtained Valencia's assistance as "a backup" because Valencia "knew how to fight" whereas he had never been in a fight before. He felt he needed such assistance in case other people at the party interfered with his desire for vengeance on the bouncer. Valdez testified that he believed that the rifle was being brought to the warehouse solely "for protection."

At trial, Valdez could recall only two visits to the warehouse; the first visit with Gonzalez, and a single visit with Valencia. In his version of the events, the two visits with Valencia were consolidated into a single visit. He contended that he had banged on the door merely to try to get the "bouncer" to come out and fight him. Valdez denied having done anything to the BMW's tires. He claimed that he had believed that one of the two partygoers was the "bouncer" when he encountered him in front of the warehouse.

Consequently, he challenged this partygoer to fight. Valdez denied making any "signal" for Valencia to fetch his rifle, and he claimed that he was unaware that Valencia was even holding the rifle until he heard the shots. He explained his lack of awareness by placing Valencia behind him throughout the altercation with the two partygoers. Valdez expressly denied having intended for "the building to be shot" or for anyone to be hurt. He also denied having had any knowledge that Valencia was going to fire the rifle at the building or any person. He asserted that his sole purpose was to "fight the bouncer."

A [defense] expert on the effects of alcohol testified that alcohol can cause a human being to lose the "ability to divide attention" so that the person experiences a sort of "tunnel vision" where he or she is unaware of things that a sober person would be aware of. The intoxicated individual may become preoccupied with his or her own thoughts and "ignore everything else." The expert also explained that intoxication can cause memory lapses, and such memory losses are likely to be incomplete so that the person remembers fragments of the events. Such a memory loss might involve the blending of two events into one. However, a memory loss which is self-serving because it eliminates incriminating events is likely to be faked rather than a real memory loss induced by alcohol intoxication.

(See *People v. Mendoza*, No. H012195, slip op. at 2-7 (Cal. Ct. App. Jan. 29, 1999).

24 The charges submitted to the jury were one count of murder in the first degree (Pen.
25 Code § 187), five counts of attempted premeditated murder (Pen. Code §§ 187, 664), and
26 one count of discharging a firearm at an occupied building (Pen. Code § 246), all with
27 additional arming allegations (Pen. Code § 12022(a)(1), (b)). The trial court instructed the
28 jury on aiding and abetting, using the state standard instruction, CALJIC 3.01:

1 A person aids and abets the commission or attempted commission of a crime
2 when he or she with knowledge of the unlawful purpose of the perpetrator and
3 with the intent or purpose of committing, encouraging or facilitating the
4 commission of the crime by act or advice aids, promotes, encourages or
5 instigates the commission of a crime.

6 RT 10276. The trial court later instructed the jury on intoxication, using the standard
7 instruction, CALJIC 4.21.1, modified to include the specific crimes alleged:

8 Under the law, it is the general rule that no act committed by a person while in
9 a state of voluntary intoxication is less criminal by reason of being in such
10 condition.

11 Thus, the crime of shooting at an occupied building in Count 7, or a crime of
12 accessory [and] grossly negligent discharge of a firearm, which are lesser
13 thereto, the fact that the defendant was voluntarily intoxicated is not a
14 defense and does not relieve defendant of responsibility for the crime. This
15 rule applies in this case only to the crimes of shooting at an occupied building.
16 And the lesser charge of accessory and grossly negligent discharge of a
17 firearm.

18 However, there is an exception to this general rule, namely, where a specific
19 intent or knowledge is an essential element of a crime. In such event, you
20 should consider the defendant's voluntary intoxication in your determination of
21 whether the defendant possessed the required specific intent or knowledge of
22 at the time of the commission of the alleged offense.

23 Thus, in the crimes of murder and attempted murder charged in Counts 1
24 through 6, and the lesser crime of voluntary manslaughter, a necessary
25 element is the existence in the mind of the defendant of a certain a specific
26 intent or knowledge which is included in the definition of the crimes set forth
27 elsewhere in these instructions.

28 If the evidence shows that the defendant was intoxicated at the time of the
29 alleged crime, you should consider the fact in determining whether or not
30 such defendant had such specific intent or knowledge.

31 . . . [I]f from all the evidence you have a reasonable doubt whether the
32 defendant had such specific intent or knowledge, you must find that the
33 defendant did not have such specific intent or knowledge.

34 RT 10279-10280.

35 On November 3, 1993, in the Santa Cruz County Superior Court, a jury convicted
36 Valdez of one count of second degree murder, five counts of attempted murder without
37 premeditation, and one count of shooting at an occupied building. As to each count, a non-
38 personal arming allegation was found true. The convictions were based on Valdez's role as
39 an aider and abettor of Valencia, the person who actually fired the gun. On January 21,
40 1994, Valdez was sentenced to state prison for an indeterminate term of 15 years to life on

1 the second degree murder count, the one-year term for the arming enhancement to be
2 served consecutively to the indeterminate term; the sentences on the other charges were
3 imposed to run concurrently therewith.

4 Valdez appealed his convictions to the California Court of Appeal on several
5 grounds, one of which was that the trial court prejudicially erred by refusing to instruct the
6 jury that evidence of his intoxication was relevant to the intent element of aiding and
7 abetting. The Court of Appeal affirmed Valdez's conviction on November 18, 1996, holding
8 that former California Penal Code § 22(b) did not permit admission of evidence of voluntary
9 intoxication to disprove the intent element of aiding and abetting. (See Petition For Writ Of
10 Habeas Corpus ("Pet."), App. A, People v. Mendoza, No. H012195, slip op. at 1-5 (Cal. Ct.
11 App. Nov. 18, 1996) (Bamattre-Manoukian, J., concurring).) After granting rehearing, the
12 Court of Appeal affirmed its prior ruling on May 23, 1997. (See Pet., App. C, People v.
13 Mendoza, No. H012195, slip op. at 1-22 (Cal. Ct. App. May 23, 1997) (Bamattre-
14 Manoukian, J., concurring).)²

15 The Supreme Court of California granted review and, on August 23, 1998, reversed
16 the Court of Appeal, holding that former § 22(b) permitted the fact-finder to consider
17 evidence of intoxication in determining the knowledge and intent elements of aiding and
18 abetting. (See Pet., App. E. at 1, People v. Mendoza, 18 Cal. 4th 1114 (1998)). The
19 Supreme Court explained:

20 Awareness of the direct perpetrator's purpose is critical for the alleged aider
21 and abettor to be culpable for that perpetrator's act. A person may lack such
22 awareness for many reasons, including intoxication. A person who is actually
23 unaware that his or her noncriminal act might help another person commit a
crime should not be deemed guilty of that crime and all of its reasonably
foreseeable consequences even if intoxication contributes to, or is the sole
reason for, that lack of awareness.

24 . . . Anyone, including a drunk person, who knowingly and intentionally aids
25 and abets a criminal act is guilty. Intoxication is relevant only to show the
person did not act knowingly and intentionally.

²⁷ In both of the above-referenced decisions of the California Court of Appeal, Justice
²⁸ Bamattre-Manoukian's concurring opinion was joined by Justice Cottle and, thus,
constitutes the majority opinion on the issue of instructional error with respect to Valdez.

1 Id. at 1129-30 (emphases in original). As the Supreme Court observed, “[i]ntoxication may
 2 explain lack of knowledge that someone else intends to commit a criminal act; the lack of
 3 knowledge would excuse the person from liability for that act.” See id. at 1130. For these
 4 reasons, the Court concluded that evidence of voluntary intoxication is admissible under
 5 former Penal Code § 22(b), and that the jury may consider such evidence with respect to
 6 both the defendant’s knowledge and intent as an aider and abettor of all crimes charged.
 7 See id. at 1131-32. The Supreme Court cautioned, however:

8 Our holding is very narrow. Defendants may present evidence of intoxication
 9 solely on the question whether they are liable for criminal acts as aiders and
 10 abettors. Once a jury finds a defendant did knowingly and intentionally aid
 11 and abet a criminal act, intoxication evidence is irrelevant to the extent of the
 12 criminal liability. A person who knowingly aids and abets criminal conduct is
 13 guilty of not only the intended crime but also of any other crime the
 14 perpetrator actually commits that is a natural and probable consequence of
 15 the intended crime. The latter question is not whether the aider and abettor
actually foresaw the additional crime, but whether, judged objectively, it was
reasonably foreseeable. In this case, if Valdez intended to aid and abet
 Valencia in shooting at the occupied building, Valdez will not be allowed to
 argue that his intoxication prevented him from foreseeing that Valencia might
 attempt to or actually commit murder. Intoxication evidence is admissible
 only to help decide whether the defendant is legally liable for a criminal act,
 not to show that the act is less criminal because of the intoxication.

16 Id. at 1133 (citation omitted) (emphases in original).

17 The Supreme Court remanded the case to the Court of Appeal to determine whether
 18 the intoxication instructions given were “prejudicially defective.” See id. at 1134-35. In so
 19 doing, the Supreme Court directed the Court of Appeal to use a two-step process:

20 The appellate court should review the instructions as a whole to determine
 21 whether it is reasonably likely the jury misconstrued the instructions as
 22 precluding it from considering the intoxication evidence in deciding aiding and
 23 abetting liability. Any error would have the effect of excluding defense
 evidence and is thus subject to the usual standard for state law error: “the
 court must reverse only if it also finds a reasonable probability the error
 affected the verdict adversely to defendant.”

24 Id. at 1134-35 (quoting People v. Humphrey, 13 Cal. 4th 1073, 1089 (1996)).

25 On remand, in an unpublished opinion filed January 29, 1999, the Court of Appeal
 26 found the jury instructions given were defective under state law because there was a
 27 reasonable likelihood that the jury would have “misconstrued the instructions as precluding
 28 it from considering the intoxication evidence in deciding aiding and abetting liability.” (See

1 Pet., App. F. at 11). The Court of Appeal found the error harmless, however, based on its
 2 determination that "it is not reasonably probable that the jury's verdict was in any way
 3 affected by the defective intoxication instruction." (See id.) As the Court of Appeal
 4 reasoned:

5 The only issues to which the intoxication evidence was relevant were Valdez's
 6 knowledge of Valencia's intent to shoot at the warehouse and Valdez's intent
 7 to further that purpose. The evidence of Valdez's knowledge and intent was
 8 extraordinarily strong. During their first visit to the warehouse, Valdez
 9 threatened the partygoers that he would "kill you motherfuckers" and
 10 repeatedly stated that he was "going to get a gun and come back here and
 11 fucking kill you." In Valdez's presence, Gonzalez and Mendoza also
 12 threatened to return "with a gun" and "kill you." The three men also
 13 threatened to kill "all" of the partygoers. On their second visit to the
 14 warehouse, Valdez again repeatedly stated that "[w]e're going to fucking kill
 15 you all" and "[w]e're going to come back and kill you all." Valdez admitted at
 16 trial that he knew that Valencia was bringing a rifle with him when they
 17 returned to the warehouse. The third visit was free of verbal threats by
 18 Valdez, but he was seen to make a signal to Valencia which was immediately
 19 followed by Valencia's retrieval of the rifle from the car. Valencia then pointed
 20 the rifle at one of the partygoers at the same time that Valdez was poking a
 21 stick at the same partygoer's face. When the partygoer retreated, Valencia
 22 began firing the rifle.

23 The evidence presented by Valdez in defense provided no reasonable basis
 24 for a rejection of the prosecution's strong evidence of Valdez's explicitly
 25 stated intent. . . .

26 . . . It is highly probable, on this record, that the jury based its evaluation of
 27 Valdez's mental state on Valdez's repeated express threats to return to the
 28 warehouse with a gun and kill "all" of the partygoers. This evidence was
 29 highly indicative of his knowledge of and intent to further Valencia's shooting
 30 at the warehouse upon their return with a gun. The only defense offered
 31 against this evidence was Valdez's testimony that he never made any threats.
 32 Since the threats were heard by numerous witnesses, his denial was not
 33 remotely credible. Moreover, the jury's resolution of the question as to
 34 whether Valdez made these threats could not have been influenced by the
 35 defective intoxication instructions. It is not reasonably probable that a rational
 36 juror would have doubted that Valdez's own repeated statements of his intent
 37 were an accurate reflection of his mental state simply because there was
 38 evidence that he was intoxicated when he made the statements and when his
 39 explicitly stated purpose was later realized. We are therefore compelled to
 40 reach the conclusion that the trial court's defective intoxication instructions did
 41 not prejudice Valdez and do not require reversal.

42 Id. at 11-13. The Court of Appeal did not address whether the jury instructions violated
 43 Valdez's rights under the United States Constitution.

44 Valdez's request for review by the California Supreme Court was denied on May 12,
 45 1999. On January 10, 2000, the United States Supreme Court denied Valdez's petition for

1 a writ of certiorari.

2 On December 20, 2000, Valdez filed the instant petition for a writ of habeas corpus,
 3 pursuant to 28 U.S.C. § 2254, in which he contends the state court's instructions on
 4 intoxication were erroneous and violated his rights under the Due Process Clause of the
 5 14th Amendment to the United States Constitution. (See Pet. at 30:1-4.) In particular,
 6 Valdez argues, the instructions precluded the jury from considering the effect of his
 7 intoxication on the knowledge and intent elements of the crime of aiding and abetting.
 8 Valdez further contends the error was not harmless and warrants habeas relief.

9 In an order filed December 22, 2003 ("Order"), this Court found "the state court
 10 violated Valdez's clearly established rights under the Due Clause of the United States
 11 Constitution by failing to properly instruct the jury on how to consider evidence of Valdez's
 12 intoxication." (See Order at 16:21-23.) In particular, "by improperly instructing the jury in a
 13 manner that precluded it from considering evidence of Valdez's intoxication, the trial court
 14 in effect reduced the prosecution's burden of proving knowledge and intent beyond a
 15 reasonable doubt, thus making it easier for the jury to convict Valdez." (See *id.* at 15:2-5.)
 16 Additionally, the Court found that because "Valdez's primary defense was his lack of
 17 knowledge and intent," and "[h]is evidence of his intoxication was part of that defense," the
 18 erroneous jury instructions "precluded the jury from fully considering Valdez's defense, thus
 19 denying Valdez a 'meaningful opportunity to present a complete defense.'" (See *id.* at
 20 16:11-15 (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

21 Nonetheless, the Court found, Valdez was not entitled to habeas relief. (See Order
 22 at 22:6-7.) In so holding, the Court noted that where an erroneous jury instruction results in
 23 a constitutional violation, courts must apply the harmless error analysis mandated by
 24 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), under which analysis habeas relief is
 25 warranted "only where the error had substantial and injurious effect in determining the jury's
 26 verdict." (See Order at 16:25-28 (internal quotation and citation omitted).) Further noting
 27 that the California Court of Appeal had applied a state law harmless error standard that the
 28 Ninth Circuit has held to be "the equivalent of the *Brecht* standard under federal law," *see*

1 Bains v. Cambra, 204 F.3d 964, 971 n.2 (9th Cir. 2000), this Court held habeas relief was
 2 appropriate “only if the Court of Appeal’s application of the law to the facts was objectively
 3 unreasonable.” (See Order at 17:7-19.) Relying on “[t]he considerable quantity and
 4 strength of the evidence of Valdez’s knowledge and intent,” this Court held the California
 5 Court of Appeal’s decision was not objectively unreasonable, and, accordingly, denied
 6 Valdez’s petition. (See id. at 19:9-12, 21:26-22:4.)

7 On appeal, the Ninth Circuit reversed. See Valdez v. Castro, 155 Fed. Appx. 301
 8 (9th Cir. Nov. 23, 2005). In particular, the Ninth Circuit held, because the California Court
 9 of Appeal’s harmless error review was not conducted under Chapman v. California, 386
 10 U.S. 18 (1967), this Court “erred in applying the objective unreasonableness test of 28
 11 U.S.C. § 2254(d) to the state court’s decision rather than conducting its own harmless error
 12 review under Brech.” See id. at 302.³ The Ninth Circuit remanded the action for the
 13 purpose of “conduct[ing] a Brech analysis in the first instance, informed by input from the
 14 parties based on the correct standard.” See id. After the Ninth Circuit issued its mandate
 15 in January 2006, this Court, as noted, sought supplemental briefing from the parties.

16 Thereafter, in an unrelated case, the United States Supreme Court granted certiorari
 17 on the following issue: “If constitutional error in a state trial is not recognized by the
 18 judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial
 19 impact of the error assessed under the standard set forth in Chapman v. California, 386
 20 U.S. 18 (1967), or that enunciated in Brech v. Abrahamson, 507 U.S. 619 (1993)?” See
 21 Fry v. Pliler, 127 S.Ct. 763 (2006). In the instant petition, Valdez had argued that the Court
 22 should apply the Chapman standard, rather than Brech. (See Pet. at 38-46.) On June 11,
 23 2007, the Supreme Court held that “in § 2254 proceedings a court must assess the
 24 prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial
 25 and injurious effect’ standard set forth in Brech, whether or not the state appellate court
 26 recognized the error and reviewed it for harmlessness under the ‘harmless beyond a

27
 28 ³ In so holding, the Ninth Circuit observed that Valdez “fail[ed] to raise a similar issue
 in the district court,” see id., but that respondent had not objected or argued waiver.

1 reasonable doubt' standard set forth in Chapman." See Fry v. Pliler, 127 S.Ct. 2321, 2328
 2 (2007) (internal citations omitted).

3 Accordingly, this Court will review the instant matter under the Brech standard.

4 **DISCUSSION**

5 **A. Legal Standard**

6 Under Brech, the Court must determine whether, in light of the record as a whole,
 7 the constitutional violation "had substantial and injurious effect or influence in determining
 8 the jury's verdict." See Brech, 507 U.S. at 637 (quoting Kotteakos v. United States, 328
 9 U.S. 750, 776 (1946)). Habeas relief may not be granted "based on mere speculation that
 10 the defendant was prejudiced by trial error; the court must find that the defendant was
 11 actually prejudiced by the error." See Calderon v. Coleman, 525 U.S. 141, 146 (1998).

12 In applying this standard, the proper inquiry is not whether the jurors were "right in
 13 their judgment, regardless of the error or its effect upon the verdict"; rather, the issue is
 14 "what effect the error had or reasonably may be taken to have had upon the jury's
 15 decision." See Kotteakos, 382 U.S. at 764. Accordingly, courts may not find an error
 16 harmless because the evidence presented at trial, apart from the error, was sufficient to
 17 support the conviction. See Kotteakos, 328 U.S. at 765; see also Taylor v. Maddox, 366
 18 F.3d 992, 1017 (9th Cir. 2004) ("In determining whether error was harmless, we do 'not
 19 examine whether there was sufficient evidence to support the conviction in the absence of
 20 the constitutional error.'") (citation omitted).

21 With respect to which party bears the burden of proof on the issue of harmlessness,
 22 the Supreme Court has stated that it is "conceptually clearer for the judge to ask directly,
 23 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the
 24 judge to try to put the same question in terms of proof burdens[.]" See O'Neal v. McAninch,
 25 513 U.S. 432, 436-37 (1995). If the district court is "in grave doubt about the likely effect of
 26 an error on the jury's verdict," the district court "should treat the error, not as if it were
 27 harmless, but as if it affected the verdict[.]" See id. at 435.

28 //

1 **B. Harmless Error Analysis**

2 For the reasons set forth below, the Court finds the instructional error at issue "had
3 substantial and injurious effect in determining or influencing the jury's verdict." See Brecht,
4 507 U.S. at 637 (internal quotation and citation omitted).

5 First, Valdez's evidence of intoxication was key to his defense and perhaps his best
6 hope of creating a reasonable doubt as to whether he knew about Valencia's purpose to
7 fire the rifle at the building and whether he intended to further that purpose. The evidence
8 of Valdez's intoxication and its effects was substantial. Valdez testified that he drank
9 between eight and ten beers before the first altercation at the party. (See Castro Answer,
10 Ex. B, Vol. 34 at 8055-59, 8219, 8230.) Scott Smith, a defense witness who was with
11 Valdez during the drinking bout, corroborated this testimony. (See id., Vol. 35 at 8259-
12 260.) Valencia and his girlfriend, Marisol Arizpe, both testified that when Valdez came to
13 pick up Valencia, Valdez was so drunk that it was difficult to understand his speech. (See
14 id., Vol. 27 at 6397-99; id. Vol. 32 at 7656.) Augustin Gonzalez, the brother of Gabriel
15 Gonzalez, testified that when he saw Valdez during Valdez's second visit to the party,
16 Valdez was so intoxicated that he did not recognize Augustin Gonzalez and instead thought
17 he was the bouncer. (See id., Vol. 25 at 5943.) Prosecution witnesses also testified that
18 Valdez was intoxicated during his first two visits to the party. (See id., Vol. 20 at 4536,
19 4581 (testimony of Mary Plell); id., Vol 25 at 5799 (testimony of David Plell).)

20 Additionally, Valdez's expert testified that intoxication may cause a person to focus
21 on one thing to the exclusion of his surroundings. (See id., Vol. 35 at 8393, 8400, 8404.)
22 Valdez testified that before the shots were fired, he was facing a person he thought was the
23 bouncer, and told that person he wanted to fight him because he, the "bouncer," had hurt
24 his friend. (See id., Vol. 34 at 8088-8090.) Valdez further testified that he did not tell
25 Valencia to get the gun, that he was unaware that Valencia had left to get the gun, and that

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1 the first time he knew that Valencia had the gun with him was after Valdez heard the shots.⁴
 2 (See *id.* at 8092-93.) During closing argument, Valdez's counsel expressly argued an
 3 intoxication defense to the jury. (See Castro Answer, Ex. B, Vol. 39 at 10387-392.)
 4 Specifically, Valdez's counsel argued that throughout the events at issue, and at the time of
 5 the shooting in particular, Valdez was heavily under the influence of alcohol, that he was
 6 focused only on fighting, and that he had no intent to shoot at a building or any person.
 7 (See *id.*) He reminded the jury that Valdez's expert had testified that an intoxicated person
 8 often has tunnel vision. (See *id.*) Finally, he argued that "if, drunk or sober, he did not
 9 know [Valencia] was going to shoot, or did not have the particular intent of furthering that
 10 purpose, then he's not guilty. And if because of intoxication he did not know . . . what a
 11 sober person would have known, he's likely not guilty." (See *id.* at 10391.)

12 Thus, this is not a case where the erroneous instructions at Valdez's trial with
 13 respect to intoxication related to a defense on which Valdez presented no evidence, or an
 14 issue on which Valdez could not possibly prevail. See, e.g., *Neder v. U.S.*, 527 U.S. 1, 17,
 15 19 (1999) (holding omission of element of crime from jury instructions harmless under more
 16 stringent Chapman standard where "omitted element was uncontested and supported by
 17 overwhelming evidence"); *Toles v. Gibson*, 269 F.3d 1167, 1178-79 (10th Cir. 2001)
 18 (holding denial of funding for defense intoxication expert harmless error under Brech
 19 where "none of the . . . evidence substantiated [the petitioner's] voluntary intoxication
 20 theory"). Rather, had the jury been permitted to consider the effect of Valdez's intoxication
 21 evidence on the knowledge and intent elements of aiding and abetting, a reasonable juror
 22 could well have concluded that Valdez was so intoxicated that he did not know of
 23 Valencia's criminal purpose to shoot at the building or intend to help Valencia achieve that
 24 criminal purpose.

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 26 ⁴ The Court further notes that although Christ testified that he saw Valdez signal
 27 Valencia to get the gun, (see *id.*, Vol. 22 at 5031), de Haan made no mention of such a
 28 signal and testified only that Valencia suddenly walked off and returned with a gun, (see *id.*,
 Vol. 22 at 5073-74, 5097). Valencia also made no mention of a signal from Valdez, and
 testified that he went to get the gun because de Haan was moving towards him holding a
 flashlight "like he was going to hit [Valencia]." (See *id.* at 7534-35.)

1 Further, by precluding consideration of Valdez’s evidence of intoxication, the
2 instructions prevented the jury from evaluating the impact of Valdez’s intoxication with
3 respect to the State’s evidence as to his threatening remarks. As noted, the California
4 Court of Appeal found it “highly probable . . . that the jury based its evaluation of Valdez’s
5 mental state on Valdez’s repeated express threats to return to the warehouse with a gun
6 and kill ‘all’ of the partygoers.” (See Pet., App. F. at 12-13.) If the jury had been permitted
7 to consider the effect of Valdez’s intoxication on the intent element of aiding and abetting,
8 the jury reasonably could have found those remarks constituted drunken bravado, rather
9 than real threats he intended to carry out.

10 The Ninth Circuit has found harm, and granted habeas relief, based on errors that
11 similarly eviscerated a key defense. See, e.g., Gill v. Ayers, 342 F.3d 911, 922 (9th Cir.
12 2003) (holding exclusion of defendant's testimony at Three Strikes sentencing hearing not
13 harmless under Brech because excluded testimony, if believed, would have refuted
14 existence of prior strike; finding defendant's testimony "was not only central to his defense,
15 it was his only defense"); DePetris v. Kuykendall, 239 F.3d 1057, 1063 (9th Cir. 2001)
16 (holding erroneous exclusion of journal evidence that corroborated petitioner's testimony as
17 to state of mind not harmless under Brech; holding exclusion "had a substantial and
18 injurious effect on the verdict . . . [because] petitioner's state of mind was the critical issue
19 at trial"); cf. Sanna v. Dipaolo, 265 F.3d 1, 15 (1st Cir. 2001) (finding any error in
20 intoxication instructions harmless under Brech because "petitioner premised his defense
21 on a claim of mistaken identity" and, thus, "it [was] highly unlikely that the challenged
22 instructions had the slightest impact on the jury's deliberations").

23 || Accordingly, the petition will be granted.

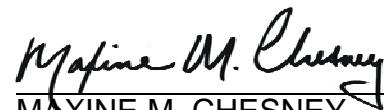
CONCLUSION

25 For the reasons set forth above, Valdez's petition for a writ of habeas corpus is
26 hereby GRANTED. Respondent shall release petitioner from custody, unless, within ninety
27 days of the filing of this order and entry of judgment thereon, respondent has filed an
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1 appeal with the United States Court of Appeals for the Ninth Circuit or the State has set a
2 date for a new trial.

3 **IT IS SO ORDERED.**

4 Dated: July 9, 2007



5 MAXINE M. CHESNEY
United States District Judge

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